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Supreme Court, U.S.
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HUMBERTO RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the introduction into evidence of key witnesses' deposition testimony violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, where the government made no effort to present the witnesses at trial but, on the contrary, actually procured their absence?

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The petitioner Humberto Rivera respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on October 24, 1988.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 859 F.2d 1204. The judgment order of the district court (App., *infra*, 26a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals affirming

petitioner's conviction was entered on October 24, 1988 (App., *infra*, 1a). On December 16, 1988, the Chief Justice extended the time for filing a petition for writ of certiorari to and including January 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States, and the relevant portions of 8 U.S.C. § 1324 and 18 U.S.C. § 3144, are set out in a statutory appendix (App., *infra*, 29a-31a).

STATEMENT

1. On August 5, 1987, special agents of the United States Immigration and Naturalization Service ("INS") conducted a raid at a construction site in Woodbridge, Virginia. During this raid, the agents arrested petitioner Humberto Rivera, who was employed as a foreman at the site, and others on charges of transporting aliens unlawfully present in the United States, in violation of 8 U.S.C. § 1324(a)(1)(B). The following day, petitioner was charged in a one-count criminal complaint with violating that statute.

On August 28, 1987, over petitioner's objection, the United States District Court for the Eastern District of Virginia granted a motion to take the depositions of four material witnesses: Wilfredo Campos-Gonzalez, Javier Vasquez, Vicente Perez-Juarez, and Alejandro Guzman-Alfaro (App., *infra*, 18a). The motion was made by counsel for the witnesses pursuant to

the material witness statute, 18 U.S.C. § 3144, and Federal Rule of Criminal Procedure 15, with the active support and full concurrence of the government (App., *infra*, 17a-18a). The deponents were aliens alleged to have been transported illegally by petitioner. Each had been incarcerated since the August 5 raid (*id.* at 17a, 22a-23a), and each had opted for voluntary departure in lieu of a contested deportation proceeding (*id.* at 16a; C.A. App. 183).[1] In exchange for their depositions, the witnesses had been granted immunity from prosecution and had been promised that they would be released and sent back to their native countries after being deposed. The government advised the court that it intended to expel the witnesses immediately after the depositions (App., *infra*, 17a-18a). The court held that humanitarian considerations arising from the witnesses' incarceration constituted exceptional circumstances justifying the depositions (*id.* at 18a). The depositions were taken on August 28. Petitioner was present and cross-examined each of the witnesses. Immediately after completion of the depositions, the INS returned the deponents to their native countries.

On September 1, 1987, a superseding indictment was handed down against petitioner (C.A. App. 14-46). It charged petitioner and three others with conspiracy to commit an offense against the United States, namely, to transport illegal aliens in violation of Section 1324(a)(1)(B), and to harbor such aliens in violation of 8 U.S.C. § 1324(a)(1)(C). Petitioner was also charged with nine substantive transportation offenses and several substantive harboring offenses.

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[1] References to the Joint Appendix filed in the Fourth Circuit are designated "C.A. App."

Petitioner moved to suppress the depositions and their fruits, contending that the depositions had been obtained in violation of Federal Rule of Criminal Procedure 15 and that the testimony was not sufficiently reliable to be admitted at trial. The District Court denied this motion on October 30, 1987 (App., *infra*, 23a-24a; C.A. App. 3).

On November 2, 1987, the charges against petitioner and one other defendant were tried. In response to petitioner's renewed motion to suppress the depositions, the district court severed the conspiracy and harboring charges, but declined to exclude the depositions in regard to the transportation counts (App., *infra*, 25a).

At trial, the government presented the testimony of the INS agents about the circumstances surrounding the August 5, 1987, raid and the illegal status of the aliens allegedly transported by petitioner (C.A. App. 88-150). Only one of the aliens allegedly transported by petitioner actually testified in court. Nicolas Guerrero, Rivera's brother-in-law, testified that he had entered the United States in 1980 and had applied for legal residency under the government's amnesty program (C.A. App. 173). Guerrero further testified that he lived and worked with petitioner and sometimes rode with him to the construction site, at which Guerrero had a summer job (C.A. App. 170). According to Guerrero, petitioner never indicated that he knew or believed any of the people they worked with to be illegal aliens (C.A. App. 171).

The heart of the government's case was presented through the deposition testimony of Wilfredo Campos, Vicente Perez, and Javier Vasquez. Selected questions from the transcripts were read to the jury by counsel,

with the judge's law clerk playing the parts of the witnesses (C.A. App. 178-79). The deposition transcripts were entirely in English. They gave no indication that the witnesses had actually been questioned through an interpreter and had testified entirely in Spanish. The excerpts that were read to the jury did not reveal that the depositions had been taken in prison under circumstances suggesting duress, or that the testimony had been given with the understanding that the witnesses would then be released and sent back to their native countries. Nor did the portion of the depositions read at trial reveal that the witnesses had been immunized from prosecution.

The deposition testimony read in court, although confusing and inconsistent, was sufficient, if considered in the light most favorable to the government, to support conviction.[2] Petitioner testified that, with the exception of Guerrero, his brother-in law, he did not know that the co-workers to whom he gave rides were in the United States illegally (C.A. App. 259-60). He also explained that none of the persons for whom he cashed checks, except for Guerrero, could read or write in English (C.A. App. 287-88).

The transportation charges against petitioner were submitted to the jury on November 3, 1987, and the jury convicted on all counts (C.A. App. 4). The government voluntarily dismissed the untried conspiracy and harboring charges (*id.*). Petitioner's personal re-

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[2] Among other things, the deposition excerpts indicated that petitioner had driven Campos to Virginia from a construction site in Ohio (C.A. App. 208). The testimony also indicated that Perez lived in petitioner's apartment in Woodbridge (C.A. App. 238-39), and that petitioner cashed checks for all three deponents (C.A. App. 200; 237-38; 250).

cognizance bond was revoked, and he was incarcerated pending sentencing (*id.*). On December 4, 1987, the district court sentenced petitioner to concurrent three-year terms of imprisonment on each count but suspended the unserved portion of its sentence. The Court also placed petitioner on concurrent three-year terms of probation (App., *infra*, 26a-28a).

2. The court of appeals affirmed (App., *infra*, 1a). Notwithstanding that the government is required to establish the unavailability of a witness in order to introduce deposition testimony, the court's analysis did not focus on that requirement. Instead, the court concluded that the trial court had followed "both the letter and spirit" of section 3144 and Rule 15, and that its finding of "exceptional circumstances" was not clearly erroneous (App., *infra*, 7a). Although the witnesses' absence was facilitated and, in effect, procured by the government, the court found that the witnesses were "unavailable" within the meaning of Rule 15(e). The court therefore held that the introduction of the depositions at petitioner's trial did not violate his right of confrontation (App., *infra*, 7a). Relying on *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the Fourth Circuit emphasized the government's interest in promptly deporting aliens unlawfully in this country. Acknowledging the difficulty of prosecuting cases involving transportation and harboring of illegal aliens because of the financial and physical burdens resulting from their detention, the court concluded that "the actions of the United States Attorney in this case were reasonable" (App., *infra*, 9a).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit has decided an important question involving the Confrontation Clause of the Sixth Amendment in a manner that is inconsistent with this Court's decision in *Barber v. Page*, 390 U.S. 719 (1968). The decision below also conflicts, either directly or in fundamental principle, with the decision of at least one other court of appeals, and adds to the confusion and disarray among the circuits that have considered these issues. Unless reversed, the effect of the decision below will be to dispense with the demands of the Confrontation Clause in the entire class of cases involving the immigration laws in which material witnesses are subject to deportation.

1. The Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." In *Barber v. Page*, 390 U.S. 719 (1968), this Court explained that "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." 390 U.S. at 725. Where the government offers as evidence against the accused a transcript of testimony given in a prior judicial proceeding or deposition, the Confrontation Clause requires its exclusion unless the witness is unavailable for trial. *Id.* at 722.

Most important for present purposes, this Court made clear in *Barber* that a witness cannot be considered "unavailable" unless the prosecutor has made "a good-faith effort to obtain his presence at trial." 390 U.S. at 725. The principal evidence against the defendant in *Barber* consisted of a transcript of the

preliminary hearing testimony of a witness who was incarcerated in a federal prison in Texas. *Id.* at 720. This Court set aside the defendant's conviction in Oklahoma state court because of the prosecution's failure to procure the imprisoned witness's attendance at trial. This court pointed out that "the State made absolutely no effort to obtain the presence of [the witness] at trial other than to ascertain that he was in a federal prison outside Oklahoma." *Id.* at 723.

Significantly, the prosecution's failure in *Barber* was not excused by the fact that the witness, being outside the state, was presumably beyond the reach of compulsory process. This Court held that the prosecutor nevertheless had a duty to determine whether the witness was willing to appear and whether the federal prison authorities would make it possible for him to attend. Because the prosecutor made no efforts to produce the witness, the Confrontation Clause forbade the admission of the witness's former testimony.

The district court in the instant case ignored this Court's mandate in *Barber*. In permitting the government to introduce deposition testimony against petitioner, the district court failed to require an evidentiary showing of the deponents' unavailability. Instead, the court simply deferred to the prosecution's bare assertions that the INS was required by regulation immediately to deport the witnesses (C.A. App. 182-83). In fact, these assertions were belied by the regulations themselves, which authorize the INS to detain aliens who are required as witnesses in criminal cases. *See* 8 C.F.R. § 215.2(a); 215.3(g); 215.3(h) (reprinted in App., *infra.*, 31a-35a).

In affirming petitioner's conviction, the Fourth Circuit similarly failed to inquire whether the government had made a good-faith effort to obtain the presence of the witnesses at trial. Relying upon this Court's decision in *Mancusi v. Stubbs*, 408 U.S. 204 (1972), the court of appeals appears to have concluded that such a showing is unnecessary when a potential witness is located outside the United States (App., *infra*, 6a). But this Court's holding in *Mancusi*—that an absent witness was "unavailable" within the meaning of *Barber* when he had taken up residence outside this country—was based on the fact that the prosecuting State was "powerless to compel [the witness's] attendance" at trial. 408 U.S. at 212. The facts are precisely to the contrary here. The government conceded below (C.A. Br. 4,16,17) that it had the power to delay the witnesses' departure until after petitioner's trial (*see* 8 C.F.R. § 242.5(a)(3), 243.4, 244.2, reprinted in App., *infra*, 35a-38a). The government likewise conceded that it was responsible for sending the witnesses out of the country without making any effort whatsoever to return them to Virginia to present testimony. Because it was undisputed in *Mancusi* that the prosecutor had neither facilitated nor procured the witness's absence, the court of appeals erred in relying on that decision.

2. The government's position in the instant case—and the Fourth Circuit's decision adopting it—also conflicts with *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987). The government in that case confessed error in having released material witnesses from incarceration without taking genuine steps to assure their reappearance at trial. Like petitioner in the instant case, the defendant in *Guadian-Salazar*

was charged with illegal transportation of aliens. Pursuant to a standing order of the United States District Court for the Western District of Texas, the aliens were deposed shortly after the defendant's arrest. At trial, a border agent testified that he then took the witnesses to the Mexican border and provided them with trial subpoenas and with notices stating in English and Spanish that, if their testimony were needed, the INS would provide for them to enter the United States legally. The agent admitted, however, that the witnesses' home was several hundred miles from the border, that no funds were advanced to facilitate their return, and that the government made no real effort to contact the witnesses in the month before trial. *Id.* at 346. The court nevertheless admitted the depositions into evidence and the defendant was convicted. On appeal, the government acknowledged that introduction of the deposition testimony deprived the defendant of his confrontation rights under the Sixth Amendment, and the conviction was reversed. *Id.* at 347.[3]

Other circuits that have considered this issue have also held—contrary to the Fourth Circuit in this case—that the government cannot use a witness's absence as justification for introducing his deposition, where

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[3] Despite the government's confession of error in *Guadian-Salazar*, the Fourth Circuit found "no precedential value" to the opinion on the grounds that it involved a "standing order" under which "the district judges . . . exercised no discretion" (App., *infra*, 11a). But the district court in the present case exercised no more discretion than did the court in *Guadian-Salazar*. The district court confined its inquiry to whether the witnesses were deportable aliens, then concluded in effect that such witnesses are unavailable *per se*.

the government itself has facilitated the witness's departure from the jurisdiction before trial. For example, in *United States v. Rothbart*, 653 F.2d 462 (10th Cir. 1981), the prosecutor obtained the deposition of a witness in a tax prosecution on the ground that the witness's employment required him to be in Saudi Arabia on the trial date. 653 F.2d at 464. The Tenth Circuit held that the admission of the deposition transcript at trial violated the Sixth Amendment, notwithstanding that defense counsel had been present at the deposition and had vigorously cross-examined the witness. *Id.* at 464, 466. The court noted (*id.* at 465-466) that the prosecutor had released the witness from a trial subpoena and that the only asserted basis for a finding of unavailability was that the witness was outside the jurisdiction at the time of trial:

> [T]he government . . . not only failed to make a good-faith effort to obtain [the witness's] presence at trial, but cleared existing obstacles to his journey outside the jurisdiction of the court by taking his deposition and releasing him from subpoena. Thus, [the defendant's] constitutional right to be confronted by the witnesses against him was violated.

Likewise, in *United States v. Mann*, 590 F.2d 361 (1st Cir. 1978), the government secured the deposition testimony of an Australian citizen for use in a criminal trial on the grounds that if the witness returned to Australia, it would be virtually impossible to compel her attendance at trial. During the course of the deposition, the prosecution returned to the witness her airplane tickets and passport. *Id.* at 363. Because

the witness refused to return to the United States for the trial, even though the government had offered to pay her travel expenses, the government introduced the deposition transcript into evidence, and the defendant was convicted.

The First Circuit reversed, finding that the taking of the deposition and admission of the transcript violated Federal Rule of Criminal Procedure 15(a) and Federal Rule of Evidence 804(a)(5), respectively.[4] 590 F.2d at 365-68. First, the Court found that the prosecution had failed to meet the "exceptional circumstances" requirement of Rule 15(a), because the witness's legitimate interests could well have been accommodated short of permitting her to leave the jurisdiction without a commitment to return for trial:

> Sufficient relief could have been offered the witness by placing her in lesser custody, or perhaps simply by supplying maintenance, and retaining her passport and ticket. The government could also have placed her under subpoena. There is no suggestion that such possibilities were explored .... [O]ne could almost deduce that the government's sole interest was to obtain a deposition and let the future take care of itself.

Mann, 590 F.2d at 366 (citations omitted).

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[4] Although the First Circuit addressed this issue in terms of Fed. R. Evid. 804(a)(5), the import of its analysis is fully consistent with the Confrontation Clause. Indeed, the court cited *Phillips v. Wyrick*, 558 F.2d 489, 494 (8th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978), and acknowledged parenthetically that *Wyrick* was decided on Sixth Amendment grounds. *See Mann*, 590 F.2d at 367.

Furthermore, the First Circuit emphasized that even a proper order permitting the deposition of a witness in a criminal case cannot excuse the government from meeting its burden of "taking all reasonable steps" to bring the witness to trial. 590 F.2d at 366. The court noted that the government's misuse of Rule 15(a)

> directly made possible the witness' later absence on which the government seeks to establish her unavailability within the meaning of Rule 804(a). Implicit, however, in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent.

Id. at 368.

The Fourth Circuit's opinion below addressed neither *Rothbart* nor *Mann*. It relied instead upon *United States v. Terrazas-Montano*, 747 F.2d 467 (8th Cir. 1984), and *United States v. Seijo*, 595 F.2d 116 (2d Cir. 1979), which are clearly distinguishable from the present case. In *Terrazas-Montano*, the Eighth Circuit upheld the admission of deposition testimony where the government's good-faith efforts to persuade the alien witnesses to remain for trial were thwarted by the witnesses' hunger strike and the absence of facilities for holding them effectively. 747 F.2d at 468-69. By contrast, the record in this case is utterly devoid of evidence that the government made any attempt to persuade or require the witnesses to appear for trial, despite its acknowledged authority under INS regulations to delay their departure. Moreover, the depositions in *Terrazas-Montano* were

videotaped, thus affording the jury a genuine opportunity to assess the demeanor evidence that was absent in the present case.

Likewise, the Second Circuit's decision in *Seijo* merely held that the deposition testimony of deported aliens was admissible under Federal Rule of Evidence 804(a) where the absence of the witnesses could not be ascribed to "the procurement or wrongdoing" of the government for the purpose of preventing the witnesses from testifying. *See* 595 F.2d at 120. The Second Circuit did not discuss the Sixth Amendment and hence did not consider whether the government's constitutional duty in criminal cases to make good-faith efforts to present its witnesses at trial is satisfied by merely refraining from "procurement or wrongdoing."

4. Contrary to the Fourth Circuit's statement (App., *infra*, 7a-9a), its holding is not authorized by this Court's decision in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). That case involved the Sixth Amendment's Compulsory Process Clause, not the Confrontation Clause. This Court held that a defendant's right to compulsory process is not violated in a prosecution for unlawful transportation of aliens where the government deports potential witnesses without first affording the accused an opportunity to interview them, provided that the government determines in good faith that the deportees possess "no evidence relevant to the prosecution or the defense." *Id.* at 866.

This Court in *Valenzuela-Bernal* held only that the government need not detain potential witnesses who could provide no relevant evidence. It neither held nor implied that the government may *both* deport a

witness *and* avail itself of his testimony through the use of deposition transcripts at trial. Indeed, as this Court was careful to observe, the government in that case detained one of the alien witnesses to testify at an evidentiary hearing, thereby providing a nonhearsay basis for establishing that the defendant had transported an illegal alien. *Id.* at 861-62.

The Fourth Circuit's citation to *Terrazas-Montano* and *Seijo*, as well as its heavy reliance upon *Valenzuela-Bernal*, suggests that it has carved out an unprecedented and impermissible "immigration" exception to the Confrontation Clause. The decision below creates an irrebutable presumption that a material alien witness subject to deportation will be unavailable for trial, thereby permitting the introduction of deposition testimony against the accused. Indeed, the inevitable effect of the decision below will be to institutionalize in the Fourth Circuit the government's practice of "depose and depart" in cases involving alleged violations of the immigration laws. In what amounts to an exception to the Confrontation Clause, the government in those cases will be permitted to introduce deposition testimony against the accused without making the slightest effort to establish the witnesses' unavailability.

Contrary to the Fourth Circuit's view, the demands of the Confrontation Clause are not satisfied by mere citation of the government's responsibility to deport illegal immigrants. Just last Term, this Court held that the undeniably important state interest in protecting alleged child-abuse victims did not outweigh the defendant's right to face-to-face confrontation by the witnesses against him. *Coy v. Iowa*, 108 S.Ct. 2798, 2803 (1988). In *Coy*, this Court found that a

defendant's Sixth Amendment rights were violated when he was convicted of sexually assaulting a child after a trial in which, pursuant to state statute, a screen placed between him and the two complaining witnesses blocked him from their sight. This Court acknowledged that, under certain circumstances, courts may make individualized findings that the interests of the State in protecting particular child witnesses outweigh the accused's Sixth Amendment right. However, this Court rejected the type of "generalized finding" underlying the state statute. *Id.* at 2803. The same sort of "generalized finding" underlies the opinion below.

The Fourth Circuit correctly recognized that this case involves three sets of competing interests: the interests of the accused under the Confrontation Clause, the interests of the detained material witnesses, and the interests of the United States in controlling illegal immigration (App., *infra*, 7a). The significance of the opinion below thus extends beyond the fate of petitioner. The Sixth Amendment issues presented in this case will recur time and again as the government struggles to control the problem of illegal immigration. The Fourth Circuit's encouragement of the government's practice of "depose and depart" threatens the rights under the Confrontation Clause of any person accused of violations of the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-5681

United States of America,
Plaintiff - Appellee,

versus

Humberto Rivera,
Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CR-87-224-A).

Argued: July 11, 1988 Decided: October 24, 1988

Before CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

Trevor Washington Swett, III (Geoffrey Judd Vitt, CAPLIN & DRYSDALE, CHARTERED on brief) for Appellant. Paul G. Cassell, Special Assistant United States Attorney (Henry E. Hudson, United States Attorney; Keith A. Logan, Special Assistant, United States Attorney; William G. Otis, Assistant United States Attorney on brief) for Appellee.

CHAPMAN, Circuit Judge:

Humberto Rivera was convicted of nine counts of transporting illegal aliens in violation of 8 U.S.C.

§ 1324(a)(1)(B).[1] The appellant claims error by the trial court in the admission of the deposition testimony of certain alien witnesses, who had been deported prior to trial; in failing to charge the jury that there must be proof of a direct and substantial relationship between the defendant's conduct and the alien's violation of the law; and in excluding evidence and forbidding argument relating to the eligibility of the aliens for amnesty. Finding no merit in these exceptions, we affirm.

I

Appellant was indicted following an investigation by the U.S. Immigration and Naturalization Service into the transportation of illegal aliens into the northern part of Virginia from other states. At a work site, a number of illegal aliens were arrested, and shortly thereafter appellant and three others were charged with illegal transportation of illegal aliens.

Following the arrest of Rivera and the aliens, Rivera posted bond and was released from custody. The illegal aliens could not arrange the posting of a bond and they were retained in custody for a period of approximately three weeks. An attorney was appointed for these aliens, and shortly thereafter he made a motion to have their testimony taken by deposition pursuant to the Material

[1] 8 U.S.C. § 1324(a)(1)(B) Bringing in and harboring certain aliens.

(a) Criminal Penalties.

(1) Any person who -

(B) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or move or attempts to transport or moves such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

Shall be fined in accordance with Title 18, imprisoned not more than five years, or both, for each alien in respect to whom any violation of this subsection occurs.

Witness Statute, 18 U.S.C. § 3144[2] and Federal Rule of Criminal Procedure 15.[3] This motion also asked that the illegal aliens be released from custody and allowed to leave

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[2] Title 18, § 3144 Release or Detention of a material witness.

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of § 3142 of this Title. No material witness may be detained because of inability to comply with any conditions of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[3] Rule 15 of Federal Rules of Criminal Procedure.

Depositions.

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to § 3144 of Title 18, United States Code, the court on written notice of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

Rule 15(e):

> (e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of

the country. At the hearing on the motion the United States Attorney supported the taking of the depositions and the attorney for the appellant opposed. The trial judge, in granting the motion, made the following finding:

> Exceptional circumstances have been shown in that the witnesses are being incarcerated awaiting a trial. And humanitarian considerations alone demand that something be done to release them from incarceration, when their only purpose for being incarcerated is to be witnesses. And whether they voluntarily flee after their depositions have been taken or whether the INS deports them back to their countries of origin is beside the point.

Pursuant to the court's order, the depositions were taken and the appellant and his attorney were present at each deposition and participated therein, not only by cross-examining the witnesses, but by the attorney making certain comments into the record as to the demeanor and condition of the witness, i.e., "Let the record reflect that the witness is having a great deal of difficulty right now. He is very ill." "Also let the record reflect that the witness has been disturbed and is very shaky, he is crying."

After the depositions were taken the deposed aliens elected to voluntarily leave the country, rather than face normal deportation proceedings, and they were returned to Mexico.

At trial one of these depositions was read in its entirety, and since the other deposition testimony was quite similar, only selected portions of the direct and cross-examination of two other depositions were read. The evidence showed that Rivera leased a small apartment and that seven aliens

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a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

lived with him in the apartment. Appellant took the witness stand and admitted that he had transported a number of aliens to work in Virginia and that he had also transported them from Ohio to Virginia. Initially, he denied that he knew that any of them were illegal aliens, but he finally admitted that he was aware, at the time of his arrest, that Nicolas Guerrero-Avila was an illegal alien. He also admitted that he had cashed checks for the aliens because they had no personal identification.

Upon conviction Rivera was sentenced to three years imprisonment on each count, with the sentences to run concurrently. However the sentences were suspended upon service of the short period of time that Rivera had been incarcerated, and he was placed on probation.

II

Appellant claims that the use of the depositions violated his Sixth Amendment right to be confronted by the witnesses against him. The thrust of this claim is that the depositions cannot be used until the trial court finds that the witnesses are "unavailable to testify." He relies on *Barber v. Page*, 390 U.S. 719 (1968). Barber and Woods were jointly charged with armed robbery and at a preliminary hearing, Woods waived his privilege against self-incrimination and gave testimony incriminating Barber. Barber's attorney did not cross-examine Woods. Seven months later Barber was tried on the robbery charge in Oklahoma. At this time Woods was in a federal prison in Texas, and the State of Oklahoma made no effort to obtain Woods' presence at trial, but over petitioner's objection, introduced the transcript of Woods' preliminary hearing testimony, and claimed that Woods was unavailable to testify. Speaking through Justice Marshall, the Court noted that the State had made no effort to obtain the presence of Woods and it had assumed that the mere absence of the witness from the jurisdiction of the court was sufficient to show impossibility to compel his attendance. The court

rejected this assumption of unavailability and concluded "... a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." 390 U.S. at 724-25.

Barber was discussed and distinguished by the court in *Mancusi v. Stubbs*, 408 U.S. 204 (1972). In *Mancusi* a Tennessee prosecutor introduced a transcript of direct and cross-examination of the witness who had left the United States and taken permanent residence in Sweden. Prior to trial the prosecutor had attempted to subpoena the witness at his last known address. The Court found that the witness was unavailable because the State of Tennessee was powerless to compel his attendance and the court pointed out that in *Barber* the state had not met its obligation to make a good-faith effort to obtain the presence of a witness and had merely shown that he was beyond the boundaries of the prosecuting state, but in *Mancusi* the witness was out of the country and beyond the compulsory processes of the court.

The appellant argues that the deported witnesses are not "unavailable," because the United States by its own efforts made them unavailable by deporting them to Mexico. Actually, the witnesses left this country voluntarily after they were deposed and released from custody. The depositions resulted from a motion of the attorney representing the incarcerated alien witnesses. The appellant was heard on the motion and the judge made the necessary findings under Federal Rule of Criminal Procedure 15 and 18 U.S.C. § 3144. At the time the depositions were taken the witnesses could not make bail. If they were released from custody, they had no place to stay, and there was no way to ensure that they would be present at trial two months later. The appellant and his attorney were present at the taking of the depositions, the attorney cross-ex-

amined the witnesses, and he was allowed to make his personal observations of the witnesses a part of the record.

If the court had denied the motion for depositions, these alien material witnesses would have been incarcerated for more than three months, even though they were neither indicted nor convicted of a crime. The appellant was both indicted and convicted on nine counts, and he spent less time incarcerated than did these witnesses, who were deposed and deported.

We find that the trial court followed both the letter and spirit of 18 U.S. § 3144 and Rule 15, and its finding of Exceptional Circumstances was not clearly erroneous. On the present facts the illegal alien witnesses, who had been deposed and had left the country rather than await deportation, were unavailable within the meaning of Federal Rule of Criminal Procedure 15(e). The introduction of these depositions at appellant's trial did not deny him the right of confrontation.

The United States Attorney had a dual responsibility in this case. It was his duty to consider the rights of the witnesses, as well as the rights of the appellant, and to also comply with his duty of deporting the illegal aliens without undue delay. This problem was recognized by the Court in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), in which the defendant was charged with transporting an illegal alien in violation of 8 U.S.C. § 1324(a)(2). Valenzuela-Bernal had been arrested shortly after he crossed the Mexican-United States border with five illegal aliens lying down in the back of his automobile. After arrest the defendant and the passengers were interviewed. Three of the passengers admitted they were illegally in the country and identified the defendant as the driver of the car. The United States Attorney concluded that the three passengers possessed no evidence material to the prosecution or the defense and two of the passengers were deported to Mexico. Following conviction Valenzuela-Ber-

nal contended that he was denied his Fifth Amendment right to due process and Sixth Amendment right of compulsory process for obtaining favorable witnesses by the deportation of the two witnesses. The Court pointed out that the Executive Branch is charged with the responsibility of faithfully executing laws and stated:

> . . . [t]he Government is charged with a dual responsibility when confronted with incidents such as that which resulted in the apprehension of respondent. One or more of the persons in the car may have violated the criminal laws enacted by Congress; but some or all of the persons in the car may also be subject to deportation as provided by Congress. The Government may, therefore, find itself confronted with the obligation of prosecuting persons in the position of respondent on criminal charges, and at the same time obligated to deport other persons involved in the event in order to carry out the immigration policies that Congress has enacted.
>
> The power to regulate immigration - an attribute of sovereignty essential to the preservation of any nation - has been entrusted by the Constitution to the political branches of the Federal Government. *See Matthews v. Diaz*, 426 U.S. 67, 81 (1976). "The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.' " *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)). In executing this power, Congress has adopted a policy of apprehending illegal aliens at or near the border and deporting them promptly. Border Patrol agents are authorized by statute to make warrantless arrests of aliens suspected of 'attempting to enter the United States in violation of . . . law,' 8 U.S.C. § 1357(a)(2), and are directed to

> examine them without 'unnecessary delay' to determine 'there is prima facie evidence establishing' their attempted illegal entry. 8 C.F.R. § 287.3 (1982). Aliens against whom such evidence exist may be granted immediate voluntary departure from the country. *See* 8 U.S.C. § 1252(b); 8 C.F.R. § 242.5(a)(2)(i) (1982). Thus, Congress has determined that prompt deportation, such as occurred in this case, constitutes most effective effort for curbing the enormous flow of illegal aliens across our southern border.

Id. at 864.

The court also recognized the substantial financial and physical burdens upon the government resulting from any effort to detain alien witnesses and that it was impossible to prosecute many cases involving transportation and harboring of illegal aliens because of the witness problem.

In *Washington v. Texas*, 388 U.S. 14 (1967), it was held that to establish a Sixth Amendment violation of the right to compulsory process required more than the mere absence of testimony, and that the criminal defendant must show that he was denied compulsory process for obtaining witnesses in his favor. In the present case Rivera has made no showing that he has been denied testimony favorable to him, nor has he shown that the deposition testimony was any different from what the live testimony of the witnesses would have been.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), it was determined that "the lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Id.* at 74. We agree with the district judge that the actions of the United States Attorney in this case were reasonable. The motion to depose was made by the attorney for the witnesses and the U.S. Attorney supported the motion as being proper under the statute and the Federal Rules of Criminal Procedure as exceptional circumstances. Proper

notice was given to appellant and his attorney was heard in opposition to the witnesses' motion to have their depositions taken. Appellant and his attorney were present and participated fully in the taking of the depositions. The requirements and procedures of 18 U.S.C. § 3144 and Federal Rule of Criminal Procedure 15 were duly met and followed. The witnesses were entitled to release and their testimony could be and was adequately secured by deposition. The appellant was not prejudiced by the use of the depositions and the absence of the three illegal aliens.

The suggestions made by the appellant as to how the presence of the illegal aliens could have been assured at trial are all unrealistic and totally lacking in merit.

Other circuits have faced the problem of deposing illegal aliens and using deposition testimony in criminal trials. In *United States v. Terrazas-Montano*, 747 F.2d 467 (8th Cir. 1984), the court found, on facts very similar to those now before us, that exceptional circumstances did exist to justify the use of the depositions of illegal aliens, who were deported prior to trial. The court found that they were "unavailable," and to require the government to show that it was unable to procure their attendance at trial would be a useless act. The court also determined that "the trial-type setting of the depositions produced sufficient 'indicia of reliability' to satisfy the Sixth Amendment." *Id.* at 469.

In *United States v. Seijo*, 595 F.2d 116 (2d Cir. 1979), the court observed that when Federal Rule of Criminal Procedure 15 was originally adopted it only allowed criminal defendants to take depositions, but that the rule was amended in 1975 to permit the government to take depositions for use in criminal cases and conditioned admissibility of the deposition upon "unavailability" as defined in Rule 804(a) of the Federal Rules of Evidence. The court further found that Congress intended to expand the potential for the use of depositions by the government in criminal cases.

The appellant cites *United States v. Provencio*, 554 F.2d 361 (9th Cir. 1977), which is not relevant because the aliens had not been released and were still available to testify. *United States v. Vasquez-Ramirez*, 629 F.2d 1295 (9th Cir. 1980), is not applicable because the Federal Rules of Criminal Procedure were not followed in taking the deposition. Also, *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987), is distinguishable because it involved a standing order issued by the judges of the Western District of Texas which required all alien material witnesses to be deposed and released within sixty days of their detention. The government confessed error primarily because the district court's order did not address the issue of "exceptional circumstances" and that the district judges under the order exercised no discretion. The circuit court reversed, but found that many of the issues raised by the standing order had not been properly briefed or addressed. We find no precedential value to this opinion.

III

We find no merit to the appellant's claim that the judge erred in his instruction under 8 U.S.C. § 1324(a)(1)(B). Appellant contends that the judge did not give the charge that he had requested on the "substantial relationship between the transportation of the alien and the furtherance of the alien's unlawful presence in the United States." Although the trial judge did not use the exact language requested, he clearly and completely covered this element in his instructions and this exception is but a matter of semantics and not substance.

IV

The final exception is also without merit. Appellant claims that he was prevented from eliciting evidence and making arguments relating to the amnesty program for undocumented aliens. He asserts that he should have been

able to argue that the aliens were eligible for amnesty and therefore they were not in the United States illegally. The amnesty program was created under the Immigration Reform and Control Act on November 6, 1986. Pub. L. 9-603, 100 Stat. 3359. The trial judge was correct in finding that it was irrelevant to the present case. The present prosecution is for violation of 8 U.S.C. 1324(a)(1)(B) and it is necessary to show that the alien, who is transported by the defendant, "has come to, entered, or remains in the United States in violation of the law . . . ." Amnesty is irrelevant until it is granted. The record reflects that the various aliens, who were transported by defendant, had come to and entered this country illegally. There was no evidence or proffer that any of them had applied for amnesty. If at some later time they may have been eligible to apply for amnesty, this does not change their illegal status at the time of entry and at the time of the illegal transportation. In his testimony Rivera did not testify that he thought any of the aliens were entitled to amnesty. The trial judge was correct in preventing the nonissue of amnesty from coming in and adding confusion to the case.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CR 87-963-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

Humberto Rivera, et al.,

Defendants.

Friday, August 28, 1987

The above-entitled matter came on for hearing before the honorable Richard L. Williams, Judge, in and for the United States District Court for the Eastern District of Virginia, commencing at approximately 9:15 a.m.

APPEARANCES:

On Behalf of the United States of America:

KEITH LOGAN, Assistant United States Attorney

On Behalf of Mario Rivera:

SANDRA J. BOEK, Attorney at Law

On Behalf of Antonio Hernandez:

SYED I. HYDER, ESQUIRE

On Behalf of the Material Witnesses:

CHARLES W. KRAMER, ESQUIRE

PROCEEDINGS

* * *

MR. HYDER: If their testimony today in the deposition is going to be the testimony for trial, then the U.S. Attorney - and they are material witnesses, then what they in effect are doing today is locking in the trial testimony today. So my client is going to be facing a trial today at 2:00 in the deposition, without his lawyer having investigated the background of the material witnesses, without having had an opportunity to prepare for cross examination.

THE COURT: Well, now, how is that any different from any other case, because the Jencks Act only requires the government to disclose the name of the witness the day before the trial. So how is that any different from what they are doing here?

MR. HYDER: At least in those cases, Your Honor, we have had an opportunity to investigate. Here, we have not. There's been a very short time involved from the time of the arrest and the time that they're trying to take depositions. Basically, it's going to be a trial today in that deposition room. And that testimony is going to be locked in. It's going to be locked in. The witnesses are not going to be available, I'm sure that's what they're going to say. And if that's the case, we are at a terrible disadvantage.

Another thing, your Honor, the rule allows these depositions in this case, in these type of cases, in exceptional circumstances. They have to produce some evidence of exceptional circumstances. There are none. Yes, they are incarcerated. So are a hundred thousand other people, or I don't know what number. Just because they are incarcerated, Your Honor, does not make this case an exceptional case. It does not put it in any exceptional circumstance. They are illegal aliens, they might come up and say. Well, so are seven million others in the United

States who have crossed the borders just like them. There is no exceptional circumstances involved here.

Then again, the rule says it has to be in the interest of justice. I would submit to Your Honor this will be against the interest of justice to force my client to face a trial in the deposition room today, when he has not had an opportunity to investigate the witnesses who are going to be testifying against him. That's basically what it is.

If the Court does finally consider granting that motion, I would at least ask the Court to delay this for a few days and grant this motion on the condition that the U.S. Attorney give us a full discovery of all evidence. That's the only way that some semblance of justice could be brought to this matter, Your Honor, if we get a full discovery of all their evidence. And of course, the Court is aware that we would be entitled to costs and attorneys' fees and expenses under Rule 15(c) if the Court does so grant this motion. Thank you, Your Honor.

THE COURT: All right.

MS. BOEK: Your Honor, I would just like to enter a general objection to the depositions and just suggest - and we had a hearing on this before in Magistrate's Court - and suggest there's another alternative to incarcerating these material witnesses, that they do have places to stay and I believe they would be able to testify at trial, if needed. Thank you, Your Honor.

MR. KRAMER: Your Honor, may I say something, since I represent the material witnesses?

THE COURT: Yes. Yes.

MR. KRAMER: Exceptional circumstances, Your Honor, are such that - and I find this really strange. I'm usually arguing from the defendant's side, and this time I'm arguing from the witnesses' side - that the defendants are all out, and all the material witnesses, who are not

defendants in this case, are locked up and have been since August 5th. I have indicated to the attorneys, except for Mr. Hyder because I have not been able to contact him, that they are available to be talked to at any time and at any reasonable place, as long as I'm told and I can make arrangements for it. The government has cooperated. They've asked me if they could do it, and I said sure, I have no problem with that. In fact, we did it yesterday. Just tell me when, where, and if it's available for my time, it can be done.

THE COURT: Well, if their depositions are taken, what happens to them then? Are they released?

MR. KRAMER: Your Honor, my information is that the government will have no objection to them being released. And it's my information, based upon talking to the witnesses, that they wish to leave this country and to go back home.

Your Honor, two of them are from El Salvador. The remainder of the four are from Mexico. To do a background check of them, I would suggest to the Court, would be virtually impossible. If they want to come to the jail - and they're now brought up in Alexandria - they are more than happy to go talk to them, as long as they talk to me first and we can make arrangements. They've been available ever since August 5th when they've been arrested, Your Honor. And I believe that those are exceptional circumstances in this case. They're free - I mean the government can't tell me that defense counsel can't talk to them. They are absolutely entitled to talk to them, as long as the witnesses have no objection. They've indicated to me that they have no objection to talking to them. They want to do everything to expedite this so that they can leave. Three of them have family problems. One has a sick mother who is in Mexico. We haven't been able to confirm it. We're basing it on - representing it to the Court and basing it on what they told me. One has a

mother who is sick in Mexico. The other two have family who are here, who are not working, and everything is in limbo because of this, Your Honor. And we're asking that the depositions be allowed. Under the rule it can be done. And under the statute, 18 U.S.C. 3144, it also says it can be done. It says no material witness may be detained because of inability of comply with any condition of release if the testimony of such witness can adequately be secured by deposition.

Your Honor, now the defendants have known about these charges since the beginning of August. And none of them - none of the attorneys have contacted me pertaining to it.

THE COURT: Does the government care to respond?

MR. LOGAN: Yes, Your Honor. The government in this case supports counsel's motion to depose the witnesses in this case. There are six material witnesses that the government has asked be incarcerated pending trial. The alternative to this is to depose those witnesses. These witnesses have been in the custody of the government since August 5th. First, subsequent to INS action because they are illegal aliens; and secondly, because they are material witnesses, and that was done as of August 7th. Since that date, the government has contacted all of the defense attorneys, and some of defense counsel have contacted the government. There has not been one request to this date for names of witnesses or any discovery in this matter. And a Complaint was filed on August 6th. The government is at a loss to proffer as to why discovery should be an issue now, when there has been notice of the pending charge. And certainly, it is of significance that each of these material witnesses is being held.

The government would also point out that it has reason to believe that one of the defendants in this case has fled the United States. And it is certainly the government's position that if this is true, that it is all the more reason

that these witnesses either be held pending trial or deposed at the earliest possible date. Thank you.

THE COURT: All right. Do you care to respond to that?

MS. BOEK: Yes, Your Honor.

MR. HYDER: Your Honor, Mr. Kramer stated that these witnesses intend to leave the country. And the U.S. Attorney states that they intend to deport these people. Now, that's a shock to me. We are going to be faced in a trial with evidence from people taken today that we are not going to -

THE COURT: Well, you are repeating yourself now. Respond to what he said and not just keep replaying a broken record. I've heard you say that four times.

MR. HYDER: I'm responding to his statement.

THE COURT: I know, and you have gone into that fully. Do you have anything else to say?

MR. HYDER: The only thing I would say in response to Mr. Logan's argument, Your Honor, there are avenues available for the United States to bring back witnesses from foreign countries, and it is done on a regular basis. If that's the case, they should do it.

THE COURT: All right. The motion for depositions of material witnesses is granted. Exceptional circumstances have been shown in that the witnesses are being incarcerated awaiting a trial. And humanitarian considerations alone demand that something be done to release them from incarceration, when their only purpose of being incarcerated is to be witnesses. And whether they voluntarily flee after their depositions have been taken or whether the INS deports them back to their countries of origin is beside the point. But the depositions are authorized to go forward as scheduled. Call the next case.

MR. KRAMER: Thank you, Your Honor.

MR. LOGAN: Thank you.

MS. BOEK: Thank you, Your Honor.

(Whereupon, the hearing was concluded at approximately 9:25 a.m.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CR 87-00224-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

Humberto Rivera, et al.,

Defendants.

HEARING ON MOTIONS
OCTOBER 23, 1987

APPEARANCES:

KEITH LOGAN, ESQ.
Assistant United States Attorney

SANDRA J. BOEK, ESQ.
Counsel for Defendant Hernandez;

SYED I. HYDER, ESQ.
Counsel for Defendant Rivera

The Defendants, Rivera and Hernandez, in person.

MR. LOGAN: Yes, Your Honor.

THE COURT: All right. I'll continue it if she does not.

All right, I'm going to take a brief recess before the civil docket.

(RECESS)

NOTE: For this part of the hearing, only Defendant Rivera and Sandra Boek, Esq., are present at defense table.

THE COURT: Call the next case.

THE CLERK: Criminal 87-224-A, *United States of America vs. Humberto Rivera.* Are counsel ready?

MS. BOEK: Yes. Sandra Boek for the defendant, Humberto Rivera.

THE COURT: All right, and who is here for the United States? Mr. Logan again; is that correct

MR. LOGAN: Yes, Your Honor.

MS. BOEK: Your Honor, I do intend to argue a motion to suppress the depositions, but not to suppress the statement.

THE COURT: I've already ruled on the deposition. Is it the same motion?

MS. BOEK: Essentially, it is, Your Honor.

THE COURT: Do you know what rulings I made in the previous case?

MS. BOEK: (Pause)

THE COURT: I'll review them for you.

MS. BOEK: Thank you very much.

THE COURT: The motion to suppress the search of Blazer Building was denied. The motion to suppress defendant's statement taken by agents of the United States was withdrawn, and I understood that your clients, on behalf of your client, you also intended to withdraw that. Is that correct?

MS. BOEK: That's correct, Your Honor.

THE COURT: The third was a motion to suppress depositions that were taken pursuant to Rule 15. I didn't

suppress them, but I limited their use to the transportation count of which the defendants had formal notice when the depositions were taken, and I will prohibit their use in connection with the harboring and conspiracy to transport. So that applies to your client, as well.

Did you have anything further you wanted to say in connection with that motion?

MS. BOEK: Yes, Your Honor, I may have. I didn't hear my co-counsel's argument, but the conditions under which the depositions were taken made it every difficult and very, not only was it very stressful for the material witnesses who were deposed, but it made it very difficult to cross-examine them, the witness.

THE COURT: Were you there?

MS BOEK: Yes, I was, Your Honor.

THE COURT: Well, it wasn't stressful for you, was it?

MS. BOEK: No, Your Honor, although it was difficult because of the stress that the witnesses were under and -

THE COURT: Well, lots of depositions are stressful for witnesses.

MS. BOEK: Yes. This was unusually so, though, Your Honor.

THE COURT: Well, I can't make -

MS. BOEK: Well, for example, the first witness almost passed out. For example, he broke down and he was, he was completely ill during the deposition, and I was going to request this court to suppress two depositions in particular, the deposition of that first witness and the deposition of a third witness - I believe it's the third or fourth witness - who also had not fared well during his incarceration. He also had not been able to sleep nor eat, and

he was in an extremely distraught and ill state during the time of the depositions.

THE COURT: All right.

Mr. Logan, do you have anything you want to say about that? Were you at the depositions?

MR. LOGAN: Yes, Your Honor. The witness, there was nothing to indicate that he was ill or distraught to the point where it affected his deposition. As a matter of fact, he was asked at one time whether he wanted to continue with it, and he said yes. The depositions were in fact freely taken, Your Honor, and certainly Miss Boek made her objections known on the record at that time as to what her personal observations were, and there is nothing medically in the record to indicate that there was an illness which in any way would have affected the witnesses' ability to testify at that time.

THE COURT: Were the witnesses cross-examined?

MR. LOGAN: Yes, they were, Your Honor. They were cross examined by all four counsel, counsel for each of the defendants charged.

THE COURT: all right.

Anything further, Miss Boek?

MS. BOEK: Yes, Your Honor. I would just like to rebut Mr. Logan's testimony, in particular about the first witness. In fact, we had to stop the deposition in the middle of the deposition because he broke down crying and he was about to faint, and he was absolutely unable to continue. So we had dinner brought in for him, ate for a while. We all took a recess and we waited until he could calm down. He was completely distraught and I will, that will be easily corroborated when we come to trial if we have to do so, if the motion is not suppressed today.

THE COURT: All right, I think what you've indicated does not rise to the level of anything that this court would

conclude was coerced testimony or anything of that sort, and as you indicated, the deposition was halted and food brought in until the witness calmed down, and I'm not persuaded that I should suppress it. I will limit the use of the deposition to the count, or to the charge as to which the defendant had formal notice at the time the depositions were taken, and that's a fairly liberal ruling because I've not made any searching inquiry into whether there really would be, I think there would be, but I haven't made the inquiry into the facts of this case and the elements of an offense of harboring and conspiracy to transport to determine whether it really would have made much difference in the cross-examination by the defendants, but I think fundamental fairness to the defendants requires that they be formally on notice of the charges as to which that testimony is going to be used against them.

That would be different if the testimony were merely going to be used to impeach a witness, or something of that sort, but to be used, as I understand it, as evidence to prove the elements of the offense in the government's case in chief. So that part of the motion has been granted with respect to the other defendant, and will also granted in that limited way with respect to your client.

The defendant's motion to quash based on that was denied because the grand jury is certainly entitled to look at whatever evidence it sought. There didn't need to be depositions. The agents could have gone and interrogated these material witnesses on their own and presented sworn statements or some other evidence to the grand jury, from which a grand jury could have taken whatever action it deemed appropriate. So it will not be quashed for that purpose.

Now, you have, as I recall, those were all the motions, then, were they not?

MS. BOEK: No Your Honor, I have another motion, which is four attorneys' fees pursuant to Rule 15.

THE COURT: Yes.

MR. LOGAN: Excuse me, Your Honor, if we could clarify one point with regard to the motion to quash on the depositions on those other charges.

THE COURT: Yes.

MR. LOGAN: The elements, where there is an overlap in the elements, I would presume by your statement those elements were in fact the same, were in fact addressed by counsel's questions, or that counsel had the opportunity to address those elements, that those elements would be facts that are consistent for one or more charges.

* * *

THE COURT: I am going to sever it out. Charging both transportation and harboring is like taking one gun and charging possession and receipt. You know, the Government can take a -

MR. LOGAN: Yes, Your Honor.

THE COURT: We'll try it on transporting only.

MS. BOEK: So is that to say there will be no evidence whatsoever admissible in general in the case on the harboring issue?

THE COURT: Well, to the extent that - I am not going to try the harboring. There is not going to be a great deal of difference in the evidence one way or another but I am not going to submit to this jury either harboring or conspiracy.

MS. BOEK: Okay.

THE COURT: The evidence is going to be the same.

MR. HYDER: Thank you.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CR87-224-A

UNITED STATES OF AMERICA,
vs.

HUMBERTO RIVERA,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date *Dec. 4, 1987.*

COUNSEL: Without Counsel — However the court advised defendant of the right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

X With Counsel — *Geoffrey J. Vitt, Esq.*

PLEA: Guilty, and the court being satisfied that there is a factual basis for the plea,

Nolo Contendere,

X Not Guilty

FINDING & JUDGMENT:

Not Guilty
Defendant is
discharged

There being a verdict of

X Guilty.

Defendant has been convicted as charged of the offense(s) of Transporting and attempting to transport aliens in violation of Title 8 U.S.C. § 1324(a)(1)(B) & Title 18 U.S.C. § 2 - Counts II, III, IV, V, VI, VII, VIII, IX and XV.

Counts I, X, XI, XII, XIII and XIV were dismissed on motion of U.S. Attorney.

SENTENCE OR PROBATION ORDER:
SPECIAL CONDITIONS OF PROBATION:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on each of Counts II through IX and XV. In addition to the foregoing there is assessed, pursuant to 18 U.S.C. § 3013, against the defendant the amount of $50.00 as to each of Counts II through IX and XV for a total of $450.00. Said sentences of imprisonment shall run concurrently with each other. And, on condition the defendant be confined in a jail type institution for the time already served in custody of these charges, the remainder of the sentences of imprisonment is hereby suspended and the defendant placed on probation with supervision for a period of

three (3) years as to each of Counts II through IX and XV, upon the following terms and conditions:

1. His uniform good behavior,
2. That he obey all local, state and federal laws,
3. That he comply with the rules and regulations of the probation department and,
4. That he pay the assessment provided for in this judgment.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

Said periods of probation imposed shall run concurrently with each other.

UNITED STATES DISTRICT JUDGE

Date: Dec. 4, 1987

APPENDIX E

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

I.

8 U.S.C. § 1324. Bringing in and harboring certain aliens

(a) Criminal Penalties

(1) Any person who -

(A) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(B) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(C) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; or

(D) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law,

shall be fined in accordance with title 18, imprisoned not more than five years, or both, for each alien in respect to whom any violation of the subsection occurs.

II.

18 U.S.C. § 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

III.

8 C.F.R. § 215.2 Authority of departure-control officer to prevent alien's departure from the United States.

(a) No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provisions of § 215.3. Any departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of § 215.3 shall temporarily prevent the departure of such alien from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to de-

part, from the United States until notified of the revocation of the order.

(b) The written order temporarily preventing an alien, other than an enemy alien, from departing from the United States shall become final 15 days after the date of service thereof upon the alien, unless prior thereto the alien requests a hearing as hereinafter provided. At such time as the alien is served with an order temporarily preventing his departure from the United States, he shall be notified in writing concerning the provisions of this paragraph, and shall be advised of his right to request a hearing if entitled thereto under § 215.4. In the case of an enemy alien, the written order preventing departure shall become final on the date of its service upon the alien.

(c) Any alien who seeks to depart from the United States may be required, in the discretion of the departure-control officer, to be examined under oath and to submit for official inspection all documents, articles, and other property in his possession which are being removed from the United States upon, or in connection with, the alien's departure. The departure-control officer may permit certain other persons, including officials of the Department of State and interpreters, to participate in such examination or inspection and may exclude from presence at such examination or inspection any person whose presence would not further the objectives of such examination or inspection. The departure-control officer shall temporarily prevent the departure of any alien who refuses to submit to such examination or inspection, and may, if necessary to the enforcement of this requirement, take possession of the alien's passport or other travel document.

IV.

8 C.F.R. § 215.3 Aliens whose departure is deemed prejudicial to the interests of the United States.

The departure from the United States of any alien within one or more of the following categories shall be deemed prejudicial to the interests of the United States.

(a) Any alien who is in possession of, and who is believed likely to disclose to unauthorized persons, information concerning the plans, preparation, equipment, or establishments for the national defense and security of the United States.

(b) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities of any kind designed to obstruct, impede, retard, delay or counteract the effectiveness of the national defense of the United States or the measures adopted by the United States or the United Nations for the defense of any other country.

(c) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities which would obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or action taken by any country cooperating with the United States in measures adopted to promote the peace, defense, or safety of the United States or such other country.

(d) Any alien who seeks to depart from the United States for the purpose of organizing, directing, or participating in any rebellion, insurrection, or violent uprising in or against the United States or a country allied with the United States, or of waging war against the United States or its allies, or of destroying, or depriving the United States of sources of supplies or materials vital to the national defense of the United States, or to the effectiveness of the measures adopted by the United States for its defense, or for the defense of any other country allied with the United States.

(e) Any alien who is subject to registration for training and service in the Armed Forces of the United States and

who fails to present a Registration Certificate (SSS Form No. 2) showing that he has complied with his obligation to register under the Universal Military Training and Service Act, as amended.

(f) Any alien who is a fugitive from justice on account of an offense punishable in the United States.

(g) Any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States: Provided, That any alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under the provisions of this part.

(h) Any alien who is needed in the United States in connection with any investigation or proceeding being, or soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local.

(i) Any alien whose technical or scientific training and knowledge might be utilized by an enemy or a potential enemy of the United States to undermine and defeat the military and defensive operations of the United States or of any nation cooperating with the United States in the interests of collective security.

(j) Any alien, where doubt exists whether such alien is departing or seeking to depart from the United States voluntarily except an alien who is departing or seeking to depart subject to an order issued in extradition, exclusion, or deportation proceedings.

(k) Any alien whose case does not fall within any of the categories described in paragraphs (a) to (j), inclusive, of this section, but which involves circumstances of a similar

character rendering the alien's departure prejudicial to the interests of the United States.

V.

8 C.F.R. § 242.5 Voluntary departure prior to commencement of hearing.

(a)(1) Authorized officers. The authority contained in section 242(b) of the act to permit aliens to depart voluntarily from the United States may be exercised by district directors, district officers who are in charge of investigations, officers in charge, and chief patrol agents.

(2) Authorization. Voluntary departure may be granted to any alien who is statutorily eligible: (i) Who is a native of a foreign contiguous territory and not within the purview of class (vi) of this paragraph; or (ii) whose application for extension of stay as a nonimmigrant is being denied; or (iii) who has voluntarily surrendered himself to the Service; or (iv) who presents a valid travel document and confirmed reservation for transportation out of the United States within 30 days; or (v) who is an F-1, F-2, J-1, or J-2 nonimmigrant and who has lost such status solely because of a private bill introduced in his/her behalf; or (vi) who is admissible to the United States as an immigrant and; (A) Who is an immediate relative of a U.S. citizen, or (B) is otherwise exempt from the numerical limitation on immigrant visa issuance, or (C) has a priority date for an immigrant visa not more than 60 days later than the date shown in the latest Visa Office Bulletin and has applied for an immigrant visa at an American Consulate which has accepted jurisdiction over the case, or (D) who is a third-preference alien with a priority date earlier than August 9, 1978, or (E) who is the beneficiary of an approved sixth-preference petition who satisfies Examinations without another petition that he/she can qualify for third preference and who cannot obtain a visa solely because a visa number is unavailable, and who has a priority

date earlier than August 9, 1978; or (vii) who has been granted asylum and has not been granted parole status or a stay of deportation; or (viii) in whose case the district director has determined there are compelling factors warranting grant of voluntary departure.

(3) Periods of time. Except for classes (v), (vi), (vii), and (viii) of paragraph (a)(2) of this section, any grant of voluntary departure shall contain a time limitation of usually not more than 30 days, and an extension of the original voluntary departure time shall not be authorized except under meritorious circumstances. Upon failure to depart, deportation proceedings will be pursued. Class (v) may be granted voluntary departure in increments of 1 year conditioned upon the F-1 or J-1 alien maintaining a full course of study at an approved institution of learning, or upon abiding by the terms and conditions of the exchange program within the limitations imposed by 22 CFR 514.23. Classes (vi)(A), (B), and (C) may be granted voluntary departure until the American consul is ready to issue an immigrant visa and, in the discretion of the district director, may be in increments of 30 days, conditioned upon continuing availability of an immigrant visa as shown in the latest Visa Office Bulletin and upon the alien's diligent pursuit of efforts to obtain the visa. Classes (vi)(D) and (E) may be granted voluntary departure, conditioned upon the approved third- or sixth-preference petition as appropriate, remaining valid as well as the alien's retention of the status established in the petition, for an indefinite period until an immigrant visa is available. Classes (vii) and (viii) may be granted voluntary departure in increments of time, not to exceed 1 year, as determined by the district director to be appropriate in the case. Form I-94 issued to an alien granted voluntary departure, who is within class (v), (vi), (vii), or (viii) of paragraph (a)(2) of this section may be stamped with the legend "Employment Authorized" if the alien seeks some indication from the Service that he is entitled to be employed.

(b) Application. Any alien who believes himself or herself to be eligible for voluntary departure under section 242(b) of the Act may apply therefore at any office of the Service any time prior to the commencement of deportation proceedings against him or her. The officers designated in paragraph (a) of this section may deny or grant the application and determine the conditions under which the alien's departure shall be effected. An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply for relief from deportation under any provision of law.

(c) Revocation. If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without notice by any district director, district officer in charge of investigations, officer in charge, or chief patrol agent.

VI.

8 C.F.R § 243.4 Stay of deportation.

Any request of an alien under a final administrative order of deportation for a stay of deportation, except a request for withholding of deportation pursuant to section 243(h) of the Act, shall be filed on Form I-246 with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. Written notice of the disposition of the alien's request shall be served upon him and any notice of denial shall include specific reasons therefor; however, neither the making of the request nor the failure to receive notice of disposition of the request shall relieve the alien from strict compliance with any outstanding notice to surrender for deportation. Denial by the district director of a request

for a stay is not appealable but such denial shall not preclude the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in Part 3 of this chapter, nor such denial preclude the special inquiry officer, in his discretion, from granting a stay in connection with, and pending his determination of, a motion to reopen or a motion to reconsider a case falling within his jurisdiction pursuant to § 242.22 of this chapter, and also pending an appeal from such determination.

VII.

8 C.F.R § 244.2 Extension of time to depart.

Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director, except that an immigration judge or the Board may reinstate voluntary departure in a deportation proceeding that has been reopened for a purpose other than solely making an application for voluntary departure. A request by an alien for reinstatement or an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien and no appeal may be taken therefrom.

VIII.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 15. DEPOSITIONS

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any

designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence

of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally

or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

IX.

FEDERAL RULES OF EVIDENCE, RULE 804 HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant -

* * *

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance

* * *

by process or other reasonable means.

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1210

In the Supreme Court of the United States

OCTOBER TERM, 1988

HUMBERTO RIVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether petitioner's rights under the Confrontation Clause were violated by the admission at trial of depositions taken, pursuant to 18 U.S.C. 3144 (Supp. IV 1986) and Fed. R. Crim. P. 15(a), from illegal alien witnesses who voluntarily departed the United States prior to petitioner's trial.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 859 F.2d 1204.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1988. On December 16, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 22, 1989. The petition was filed on January 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on nine counts of transporting illegal aliens, in vio-

lation of 8 U.S.C. 1324(a)(1)(B) (Supp. IV 1986). Petitioner was sentenced to concurrent three-year terms of imprisonment on each of the nine counts, but the sentence was suspended except for that portion equal to the time that petitioner had already been incarcerated. Petitioner was also placed on concurrent three-year terms of probation. The court of appeals affirmed (Pet. App. 1a-12a, 27a-28a).

1. The evidence at trial is summarized in the government's brief in the court of appeals. It showed that on August 5, 1987, special agents of the United States Immigration and Naturalization Service (INS) executed a search warrant at a work site of the Blazer Construction Company in Woodbridge, Virginia, and arrested 47 illegal aliens at the site. Petitioner was a labor foreman at the work site and had arrived there that day with a carload of illegal aliens. After receiving *Miranda* warnings, petitioner admitted to the agents that he had harbored illegal aliens at his apartment. Gov't C.A. Br. 2-3; C.A. App. 123-124, 151-152, 161-162, 240-241.

Petitioner took the stand at trial and admitted that he had transported a number of aliens to work in Virginia and that he had also transported aliens from Ohio to Virginia. Initially, he denied knowing that the aliens were illegal, but he finally admitted that he was aware that one of his passengers, Nicholas Guerro-Avila, was an illegal alien. Petitioner also admitted that he had cashed checks for a number of the aliens because they had had no personal identification. Gov't C.A. Br. 7-8; C.A. App. 282-283.

2. For three weeks following petitioner's arrest, the government incarcerated six aliens as material witnesses to testify against petitioner. Counsel for the aliens then moved to have the aliens' depositions taken pursuant to the provisions of the material witness statute, 18 U.S.C.

3144 (Supp. IV 1986),[1] and Fed. R. Crim. P. 15.[2] Counsel also moved for the aliens' release from incarceration. Pet. App. 14a-17a. The government supported and petitioner opposed the motion (*id.* at 15a-18a). The district court granted the motion, concluding that "[e]xceptional circumstances have been shown in that the witnesses are being incarcerated awaiting a trial. And humanitarian considerations alone demand that something be done to release them from incarceration, when their only purpose of being incarcerated is to be witnesses" (*id.* at 18a).

Pursuant to the court's order, the aliens were deposed. Petitioner and his counsel were present, and they extensively cross-examined the witnesses. Thereafter, rather than face formal deportation proceedings, the aliens elected to depart the country pursuant to 8 C.F.R. 242.5. The INS returned the aliens to their native country of Mexico. Gov't C.A. Br. 4.

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[1] 18 U.S.C. 3144 (Supp. IV 1986) provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[2] Fed. R. Crim. P. 15(a) provides in relevant part:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notices to the parties order that testimony of such witness be taken by deposition * * *.

At trial, the government introduced deposition testimony taken from three of the aliens. In the first of the depositions, Wilfrido Campos-Gonzalez testified that he had worked with petitioner in Ohio and that they had driven together to Virginia. Campos-Gonzalez also explained that he and several other illegal aliens had lived with petitioner. Because the deposition testimony of the other two aliens was similar, only selected portions of those depositions were read to the jury. Gov't C.A. Br. 4, 6-7.

3. The court of appeals affirmed, holding that the admission of the deposition testimony did not violate petitioner's Sixth Amendment right to confront the witnesses against him (Pet. App. 1a-12a). The court found that the alien witnesses were "unavailable" to testify, explaining that the government had acted reasonably in agreeing to depose the aliens and thereafter permitting them to depart the country (*id.* at 9a). The court noted that the government had the " 'dual responsibility' " both to prosecute the present case and to enforce the immigration laws—which included, in this instance, the " 'obligat[ion] to deport' " the illegal aliens (*id.* at 8a, quoting *United States* v. *Valenzuela-Bernal,* 458 U.S. 858, 864 (1982)). Moreover, the court stated, "[i]f the [trial] court had denied the motion for depositions, these alien material witnesses would have been incarcerated for more than three months, even though they were neither indicted nor convicted of a crime" (Pet. App. 7a). In any event, the court reasoned, petitioner had "made no showing that he [was] denied testimony favorable to him, nor ha[d] he shown that the deposition testimony was any different from what the live testimony of the witnesses would have been" (*id.* at 9a). Moreover, the court found that petitioner's "suggestions * * * as to how the presence of the illegal aliens could have

been assured at trial [were] all unrealistic and totally lacking in merit" (*id.* at 10a).[3]

ARGUMENT

Petitioner contends (Pet. 7-16) that the admission of the aliens' deposition testimony violated his rights under the Confrontation Clause of the Sixth Amendment. The court of appeals correctly rejected that claim, and its decision warrants no further review.

The Confrontation Clause permits the introduction of prior testimony of a declarant who is not present at trial when two conditions have been satisfied: (1) the declarant is unavailable to testify at trial; and (2) the testimony bears sufficient indicia of reliability. *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972). The second condition is easily met in this case. The witnesses were under oath at the time they were deposed; petitioner was present at the depositions and was represented by counsel; there was adequate opportunity for cross-examination; and a complete record was made of the testimony.

Moreover, the court of appeals correctly found that the aliens were "unavailable" to testify at trial, and thus the first condition of admissibility is satisfied as well. To be sure, "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968). Accord *Roberts*, 448 U.S.

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[3] The court of appeals also rejected petitioner's challenge to the jury instructions (Pet. App. 11a), as well as his contention that the district court had improperly restricted the evidence and the arguments that could be offered at trial (*id.* at 11a-12a). The petition does not present those issues.

at 74; *California* v. *Green,* 399 U.S. 149, 161-162, 165, 167 n.16 (1970). But " '[t]he lengths to which the prosecution must go to produce a witness * * * is a question of reasonableness.' " *Roberts,* 448 U.S. at 74, quoting *Green,* 399 U.S. at 189 n.22. The government's actions in the present case were plainly reasonable. As this Court recognized in *Valenzuela-Bernal,* illegal immigration has become a "colossal" national concern, and "Congress has determined that prompt deportation * * * constitutes the most effective method for curbing the enormous flow of illegal aliens" across the border (458 U.S. 864 & n.5). Thus, in cases like the present one, "[t]he Government may * * * find itself confronted with the obligation of prosecuting persons [charged with transporting illegal aliens], and at the same time obligated to deport other persons involved in the event in order to carry out the immigration policies that Congress has enacted" (*id.* at 864). The detention of alien witnesses imposes "substantial financial and physical burdens upon the Government," and also involves "the human cost to potential witnesses who are incarcerated though charged with no crime" (*id.* at 865).

In light of those competing obligations, the government did not violate its duty to make a "good-faith effort[ ]" to produce the alien witnesses. *Ohio* v. *Roberts,* 448 U.S. at 74. While the government may have had the power to incarcerate the aliens until trial, it did not act unconstitutionally in declining to exercise that power, in deference to its duties to deport the aliens promptly and to address the "humanitarian considerations" (Pet. App. 18a) presented by their indefinite incarceration. In sum, the government's "exercise of [its] manifold responsibilities is not to be judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses." *Valenzuela-Bernal,* 458 U.S. at 866. Accord *United States* v. *Terrazas-Montano,* 747 F.2d 467,

469 (8th Cir. 1984) (videotaped depositions taken from aliens who were thereafter deported held admissible at trial, because "the witnesses were unavailable, under circumstances which reflect no bad faith on the part of the government"); *United States* v. *Seijo,* 595 F.2d 116, 120 (2d Cir. 1979) (quoting Fed. R. Evid. 804(a)) (depositions taken from aliens who were thereafter deported held admissible at trial, because "there is no evidence that the deported aliens were absent due to 'the procurement or wrongdoing' of the Government 'for the purpose of preventing [those deposed] from attending or testifying' ").[4]

The court of appeals' decision is not in conflict with the Fifth Circuit's decision in *United States* v. *Guadian-Salazar,* 824 F.2d 344 (1987). In that case, depositions were taken from illegal aliens, over the government's objection, pursuant to a standing order of the district court requiring "alien material witnesses to be deposed and released within sixty days of the date of their detention" (*id.* at 345). The aliens were thereafter deported and the depositions were admitted at trial. Because those procedures had been followed pursuant to a standing order of

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[4] As the court of appeals recognized, petitioner's suggestions as to how, other than by incarceration, the aliens' appearance at trial could have been assured were "unrealistic" (Pet. App. 10a). Petitioner suggested, for example, that the aliens should have been subpoenaed before their departure and ordered to reappear for trial (C.A. Br. 27). That surely would have been a "futile act," since by the time of trial, the aliens would have been thousands of miles away, and there would have been no mechanism for enforcing the subpoena. See *Ohio* v. *Roberts,* 448 U.S. 56, 74 (1980). Petitioner also suggested (C.A. Br. 29) that under the material witness statute, 18 U.S.C. 3144 (Supp. IV 1986), the aliens might have been placed on bond. But releasing the witnesses would surely have been inconsistent with the government's responsibility to remove illegal aliens from the community, and the district court correctly recognized that the aliens might flee when released (C.A. App. 58).

the court, the government concluded that the trial court had "exercised no discretion" in the case, and the government therefore confessed error on appeal. The Fifth Circuit accepted the government's confession and reversed the defendant's conviction (*id.* at 347).

The present case is easily distinguishable. Here, unlike in *Guadian-Salazar,* the district court did not proceed under a standing order, but instead responded to a motion by the aliens themselves to be deposed and deported. Counsel for the aliens informed the court of specific factors, such as the length of incarceration and the aliens' family circumstances (Pet. App. 16a-17a), that justified the taking of depositions and the subsequent deportation. In granting the motion, the district court exercised its discretion in an appropriate fashion, and petitioner has made no showing of prejudice from the admission of deposition testimony.[5]

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[5] Petitioner relies (Pet. 10-13) on the decisions in *United States* v. *Mann,* 590 F.2d 361 (1st Cir. 1978), and *United States* v. *Rothbart,* 653 F.2d 462 (10th Cir. 1981), both of which rejected the government's use of deposition testimony at trial. Neither of those cases, however, involved illegal aliens as witnesses, and thus neither presented the government with the competing law enforcement obligations recognized by this Court in *Valenzuela-Bernal.* Moreover, in the *Mann* case the First Circuit found that the government had "abused" the deposition process under Fed. R. Crim. P. 15 (590 F.2d at 368), and in *Rothbart* the Tenth Circuit concluded that the record showed that the government had "wrongfully procured [the witness's] absence for the purpose of preventing the witness from attending or testifying" (653 F.2d at 465). No such allegations can be made in the present case. Finally, the trial court in this case did not base its decision on any " 'generalized finding' " (Pet. 16), such as the one rejected by this Court in *Coy* v. *Iowa,* No. 86-6757 (June 29, 1988), slip op. 8. To the contrary, the court entertained the arguments of the witnesses and the parties and issued an order that reasonably accommodated their competing interests.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HUMBERTO RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petitioner submits this brief in reply to the Brief for the United States in Opposition (hereinafter, "Br. Opp.").

1. The government's summary of the evidence presents as an uncontested fact an admission that petitioner allegedly made to INS agents after receiving *Miranda* warnings: namely,, "that he had harbored illegal aliens at his apartment." Br. Opp. at 2. This statement is both oversimplified and irrelevant.

It is true that Agent Ramos testified that petitioner admitted sharing his apartment with seven or eight aliens and transporting two females from Houston to keep house for the group. C.A. App. 139. On cross-examination, the agent asserted for the first time that petitioner (who by the time of his arrest had already applied for temporary residency under 8 U.S.C. § 125a) confessed to knowing that all of the persons

living in his apartment were illegal. C.A. App. 142. Ramos, however, was impeached with his own investigative report, which recorded such an admission only as to the two females and not as to the other persons who shared petitioner's apartment. C.A. App. 143-44.

The record reveals that any statements made by petitioner to the agent about sharing his apartment with other aliens were not only tangential to the merits but also fell far short of the clear-cut confession of harboring depicted in the government's brief. Petitioner was not tried for harboring but for alleged transportation offenses. None of the charges involved the two females, who were the only persons whose illegal status was supposedly admitted by petitioner in the statement recorded in the agent's report. Thus, any admission as to "harboring" the two females was entirely beside the point, and it was hotly contested whether petitioner made any statement to Agent Ramos that was probative of the charges on which Rivera was convicted. C.A. App. 260, 265. Given the conflicts in the evidence concerning the agent's interrogation of petitioner, this is manifestly not a case in which the use of deposition testimony in violation of the Confrontation Clause could be excused as harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

2. By according an inordinately narrow reading to *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987), the government seeks to avoid the direct conflict between that decision and the opinion of the court of appeals in the case at bar. Specifically, the government characterizes *Guadian-Salazar* as turning solely on a standing order under which material witnesses in cases involving immigration offenses were

deposed and released as a matter of course, without the exercise of any discretion by the district court. The government now contends that only because of the standing order did it confess error in *Guadian-Salazar*; only for that reason, it implies, did the Fifth Circuit reverse the conviction that had been procured through the use of deposition testimony in that case. Br. Opp. at 7-8.

The opinion in *Guadian-Salazar* belies this interpretation. The defendant there attacked, on a variety of grounds, the use of deposition testimony given by deported aliens. Among those grounds was the claim that the government had failed to establish the unavailability of the deponents to testify at trial, and indeed had "virtually assured the witnesses' absence." *Id.* at 346. That is the very argument advanced by petitioner here. In confessing error in *Guadian-Salazar*, moreover, the government did not confine itself to acknowledging flaws in the district court's standing order on deposing material witnesses, but instead made the altogether broader concession that "there were no 'exceptional circumstances' sufficient under Rule 15 to justify deposing the witnesses." *Id.* at 347. In accepting the government's confession of error, the Fifth Circuit did not rest on the standing order but on careful examination of the record with respect to the joint contention of the government and the defendant

> that the use of the deposition testimony in this case deprived defendant of his constitutional right to confront adverse witnesses, and that in the circumstances of this case such deprivation worked to the actual prejudice of the defense.

Id.

Precisely the same deprivation of confrontation rights occurred here. Under *Chapman, supra*, it is doubtful that the reversal of petitioner's convictions requires him to make any showing of prejudice, given the government's total failure to prove the unavailability of its principal witnesses, whose absence the government itself facilitated. Yet if such a showing is required, prejudice is apparent in the circumstances cited at page 5 of petitioner's petition for certiorari. This is particularly clear insofar as substituting depositions for live testimony prevented the petitioner from confronting his accusers in the presence of the jury with regard to the bias flowing from the immunity agreements that the witnesses struck with the government prior to being deposed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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